SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1574

UNITED MINE WORKERS OF AMERICA, *et al.*,
Petitioners,

v.

ARMCO STEEL CORPORATION, *et al.*,
Respondents.

UNITED MINE WORKERS OF AMERICA, *et al.*,
Petitioners,

v.

UNITED STATES STEEL CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

The petitioners, International Union, United Mine Workers of America, District 17 and 29 of the United Mine Workers of America, and a number of Local Unions of the United Mine Workers of America, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 8, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 505 F.2d 1129 and is appended to this petition as Appendix A. The opinion and order of the United States District Court for the Southern District of West Virginia issued in the *Armco Steel* proceedings is appended to this petition as Appendix B. The temporary restraining order issued by the United States District Court for the Southern District of West Virginia in the *United States Steel* proceedings is appended to this petition as Appendix C. The order of the District Court dismissing the complaint in the *United States Steel* proceedings is appended to this petition as Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The decision of the United States Court of Appeals was entered on November 8, 1974. A timely petition for rehearing *en banc* was denied on January 20, 1975. The time for filing this petition was extended by Mr. Chief Justice Berger from April 20, 1975, to and including June 15, 1975.

QUESTION PRESENTED

If a union enters into a collective bargaining agreement establishing a mandatory arbitration procedure and then later engages in a work stoppage *solely* out of deference to a foreign picket line at the place of employment, does a federal district court have authority to enjoin the stoppage or is it precluded from granting injunctive relief by the Norris-LaGuardia Act and this Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235 (1970).

STATUTES INVOLVED

This case involves Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §104, as well as Sections 7, 8(a)(1)

and (3), and 301(a) of the National Labor Relations Act, as amended, 61 Stat. 156, 29 U.S.C. §§157, 158, and 185 (a). These provisions are appended as Appendix F.

STATEMENT

Respondents operate coal mines located in Southern West Virginia. The coal miners employed at those mines are members of the United Mine Workers of America (hereafter "UMWA"), constituent Districts, including UMWA Districts 17 and 29, and various Local Unions under the UMWA's jurisdiction. In February and March 1974, the UMWA and respondents were signatories to the National Bituminous Coal Wage Agreement of 1971. That Agreement did not contain an express no-strike clause,[1] nor did it contain any language waiving or otherwise relating to employees' rights to honor picket lines of any kind. The 1971 Agreement did, however, contain a provision for final and binding arbitration of disputes arising thereunder.

During the oil crisis in early 1974, certain unidentified coal miners—not employed by respondents—set up picket lines about respondents' mines in protest of certain state and federal regulations on the allocation, distribution and sale of gasoline, asserting that such regulations interfered with their travel to and from work. Respondents' employees—who had no dispute with their respective employers—refused to cross these picket lines, thereby causing work stoppages at respondents' mines.

A. United States Steel Corp. v. United Mine Workers of America

Respondent United States Steel Corporation filed suit February 25, 1974, in the United States District Court for the Southern District of West Virginia under Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185,

[1] To the contrary, in two parts of the Agreement, all previous no-strike clauses were expressly abrogated and disavowed.

seeking a temporary restraining order and preliminary injunction. The defendants in that action were the UMWA, District 29, UMWA, and the six Local Unions representing employees at respondent's mines. District Judge K. K. Hall promptly issued a temporary restraining order restraining the Local officers and members from engaging in a strike or work stoppage; but, in recognition of the long and established tradition of miners of not crossing picket lines, Judge Hall's order expressly provided that it "shall not be construed to require members of said defendant Locals . . . to cross an actual picket line established by persons who are not members of defendant Local Unions. . . ." (App. C, 15). After a hearing, Judge Hall entered an opinion and order finding "That the refusal of the members of the defendant Local Unions to cross said picket lines is not an arbitrable matter under the Wage Agreement and further that no arbitrable matter under the Wage Agreement is alleged or proved." (App. D, 18). Consequently, the order denied preliminary injunctive relief and dismissed the complant.

B. Armco Steel Corp., et al. v. United Mine Workers of America

Respondents Armco, *et al.*, originally filed a complaint March 4, 1974—also in the United States District Court for the Southern District of West Virginia—alleging in three counts causes of action under the Sherman Anti-Trust Act, 15 U.S.C. §1, *et seq.;* the Emergency Petroleum Allocation Act of 1973 (P.L. 93-159) and the Economic Stabilization Act of 1970, as amended, 12 U.S.C. §1904; and under common law doctrines of tortious interference. Defendants in that action were the UMWA, District 17, UMWA, Local Unions representing employees at respondents' mines, and certain named individuals. After a hearing on plaintiffs' request for injunctive relief, District Judge Dennis R. Knapp entered an order enjoining picketing by the individual defendants and the class of pickets they rep-

resented. Judge Knapp, however, dismissed the federal counts against the defendant labor organizations for lack of jurisdiction and accordingly dismissed the pendent state claim as well. (App. B, 11-12). Armco then filed an amended complaint, adding a fourth count based upon Section 301 of the Labor-Management Relations Act, similar to that of Respondent United States Steel, and made a similar motion for temporary and preliminary restraint. Concluding that the Court did not have jurisdiction under Section 301, Judge Knapp also dismissed the amended complaint as to the labor organization defendants.

C. Court of Appeals' Proceedings

Appeals from the orders entered by District Judges Knapp and Hall were consolidated in the United States Court of Appeals for the Fourth Circuit. Judge Russell, speaking for a panel which included Chief Judge Haynsworth and Circuit Judge Widener, reversed the District Court orders, holding that injunctive relief was appropriate under Section 301 where a work stoppage had occurred solely as a result of employees honoring a foreign picket line.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE SHARPLY DIVIDED ON THE ISSUE WHETHER THIS COURT'S "NARROW" HOLDING IN *BOYS MARKETS, INC.* V. *RETAIL CLERKS UNION,* 398 U.S. 235 (1970), SHOULD BE EXTENDED TO AUTHORIZE INJUNCTIONS AGAINST EMPLOYEES WHO HAVE CEASED WORK, NOT BECAUSE OF ANY DISPUTE WITH THEIR EMPLOYER, BUT SOLELY BECAUSE OF THE EXISTENCE OF A FOREIGN PICKET LINE AT THEIR PLACE OF EMPLOYMENT.

No less than five Circuits have wrestled with the issue whether work stoppages resulting from the presence of foreign pickets at the place of employment are enjoinable under this Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235 (1970). The issue is one on which the Courts of Appeals are sharply divided. The

Courts of Appeals for the Third,[2] Fourth,[3] and Seventh[4] Circuits have held that such work stoppages are enjoinable under *Boys Markets*. The Courts of Appeals for the Second[5] and Fifth[6] Circuits have held to the contrary that such work stoppages do not arise "over" any underlying work place grievance between the employer and its employees and therefore are not enjoinable under *Boys Markets*. Notably, the decisions holding such work stoppages enjoinable have frequently provoked sharp and strongly worded dissenting opinions.[7]

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[2] Compare *Island Creek Coal Co.* v. *United Mine Workers of America, et al.*, 507 F.2d 650 (3d Cir., 1975) (Petition for writ of certiorari filed simultaneously herewith); *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs*, 502 F.2d 321 (3d Cir., 1974), *cert. denied*, 43 U.S.L.W. 3330 (Dec. 10, 1974), with *Parade Publications, Inc.* v. *Philadelphia Mailers Union*, 459 F.2d 369 (3d Cir., 1972).

[3] *Armco Steel Corp.* v. *United Mine Workers of America*, 505 F.2d 1129 (4th Cir., 1974); *Monongahela Power Co.* v. *Local 2332, Int'l. Bhd. of Electrical Workers*, 484 F.2d 1209 (4th Cir., 1973); *Pilot Freight Carriers* v. *Int'l. Bhd. of Teamsters*, 497 F.2d 311 (4th Cir.) *cert. denied*, 42 L.Ed.2d 107 (1974); *Wilmington Shipping Co.* v. *Int'l. Longshoremen's Assn.*, 86 LRRM 2846 (4th Cir.), *cert. denied*, 42 L. Ed.2d 296 (1974).

[4] *Inland Steel Co.* v. *Local Union 1545, United Mine Workers of America*, 505 F.2d 293 (7th Cir., 1974).

[5] *Buffalo Forge Co.* v. *United Steelworkers of America*, 89 LRRM 2303 (2d Cir., 1975) (Appendix E).

[6] *Amstar Corp.* v. *Amalgamated Meat Cutters & Butcher Workmen*, 468 F.2d 1372 (5th Cir., 1972).

[7] See dissenting opinion of Judge Adams in *Island Creek, supra*, 507 F.2d at 654; dissenting opinions of Judges Hunter and Adams in *NAPA Pittsbugh, supra*, 502 F.2d at 324, 333; dissenting opinion of Judge Fairchild in *Inland Steel, supra*, 505 F.2d at 300; and the concurring opinion of Judge Adams in *Wilmington Shipping, supra*, 86 LRRM at 2847. Judge Adams of the Third Circuit, sitting by designation on the Fourth Circuit concurred out of deference to binding Fourth Circuit authorities, though stating his personal view that the contrary position stated in *Amstar, supra*, represents the preferable rule of law.

Likewise, the question of the enjoinability of foreign-picket work stoppages has arisen repeatedly in the District Courts. The reported District Court decisions are divided, but weigh heavily against the granting of injunctive relief in this situation.[8]

If there were need for further indication that the division of lower court authorities in this issue is continuing to spawn, that indication is provided by the Second Circuit's recent decision in *Buffalo Forge* (May 1, 1975), chronicling the parade of decisions on both sides and coming down—as stated above—against enjoinability. Obviously, the forest of conflicting decisions and lack of clear direction from this Court seriously complicates the task of District Judges confronting the issue for the first time in those Circuits which have not yet spoken, *see Plain Dealer Pub. Co., supra,* and makes virtually a mockery of any concept of uniformity in the application of federal labor law. There should be little doubt that the issue presented by this petition is one that so amply satisfies the considerations stated in Rule 19(b) of this Court as practically to command that certiorari be granted and that the issue be definitively resolved.

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[8] Decisions against enjoinability: *Stokely-Van Camp, Inc.* v. *Thacker and Cannery Warehousemen, etc.,* 89 LRRM 2145 (W.D. Wash., 1975); *12th and L* v. *Operating Engineers,* 88 LRRM 2572 (D.D.C., 1975); *Plain Dealer Pub. Co.* v. *Local 53, ITU,* 88 LRRM 2155 (N.D. Ohio, 1974); *Pilot Freight Carriers, Inc.* v. *Teamsters Local 560,* 373 F.Supp. 19, 26-27 (D.N.J., 1974); *Carnation Co.* v. *Teamsters Local 949,* 86 LRRM 3012 (S.D. Tex., June 28, 1974); *General Cable Corp.* v. *The International Brotherhood of Electrical Workers, Local Union 1644, AFL-CIO,* 331 F.Supp. 478 (D. Md., 1971); *Simplex Wire and Cable Co.* v. *Local 2208 of the International Brotherhood of Electrical Workers, AFL-CIO,* 314 F.Supp. 885 (D.N.H., 1970).

Decisions supporting injunctions: *Barnard College in the City of New York* v. *Transport Workers Union of America, AFL-CIO,* 372 F.Supp. 211 (S.D.N.Y., 1974); *Bethlehem Mines Corp.* v. *UMWA,* 375 F.Supp. 980 (W.D. Pa., 1974).

II. THE DECISION OF THE COURT BELOW IS AT ODDS WITH THIS COURT'S DECISION IN *BOYS MARKETS, INC.* V. *RETAIL CLERKS UNION*, 398 U.S. 235 (1970), AND WITH THE CONSISTENT POLICY OF THIS COURT TO ACCOMMODATE AND HARMONIZE CONFLICTING FEDERAL LABOR STATUTES.

The work stoppages herein arose simply because of the appearance of foreign picket lines at the mine sites. In the course of the lower court proceedings, respondents never even suggested that the work stoppage arose out of any underlying grievance, complaint or dispute between respondents or any of their employees. In fact, they have conceded throughout that there was no such dispute. Nevertheless, the Court of Appeals held that the work stoppage was one which should have been enjoined under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185, and this Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970). Petitioners submit that the lower court's conclusion involves a basic misunderstanding of both the holding and rationale of *Boys Markets*.

In *Boys Markets* the Court expressly adopted the dissenting opinion of Mr. Justice Brennan in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 215 (1962), as the correct view for harmonizing the seemingly absolute bar on federal labor injunctions with the strong federal policy of promoting labor arbitration. Mr. Justice Brennan's *Sinclair* dissent acknowledged that Congress had specifically refrained from repealing Norris-LaGuardia:

> [t]he legislative history of §301 . . . shows that Congress considered and rejected 'the advisability of repealing the Norris-LaGuardia Act insofar as suits based upon breach of collective bargaining agreements are concerned,' . . . there is no question here of 'repeal' (370 U.S. at 220).

Accordingly, Mr. Justice Brennan looked toward an accom-

modation giving due regard to the anti-injunction policies of Norris-LaGuardia as well as the pro-arbitration policies of Taft-Hartley:

> Congress, clearly, had no intention of abandoning wholesale the Norris-LaGuardia policies in contract suits; but it does not follow that §301 is not the equal of §4 in cases which implicate both provisions. (370 U.S. at 223).

It was with this full understanding of the legislative history of §301 that the *Sinclair* dissent articulated the rationale that later became the majority opinion in *Boys Markets:*

> A District Court entertaining an action under §301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance. (398 U.S. at 254, quoting 370 U.S. at 228) (Emphasis in original).

The exception to the proscriptions of Norris-LaGuardia was carefully limited to strikes "over" arbitrable disputes—

to situations where unions sought to settle work place grievances by economic pressure instead of submitting them to arbitration:

> Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance. (398 U.S. at 253-254)

Plainly, the rationale of *Boys Markets* and its progeny[9] is that injunctive relief is available to protect the efficacy of arbitration where parties to a collective bargaining agreement have agreed upon arbitration as the means of settling disputes between them under that agreement. The point is simply this: resort to economic measures by either party as a means of seeking resolution of a work place grievance which it has agreed to settle by arbitration would undercut the utility of arbitration as a means of settling labor disputes short of economic warfare. The appropriateness of injunctive relief hinges upon its function in preventing resort to economic warfare over disputes which by agreement are to be finally resolved through arbitration.

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[9] This Court followed the rationale of *Boys Markets* in *Gateway Coal Company* v. *United Mine Workers of America,* 414 U.S. 368 (1974) which involved a work stoppage arising out of a dispute about the safety of the employees' working conditions. Though the Union contended that safety disputes of the character presented in that case were expressly excluded from arbitration under the applicable collective bargaining agreement, the Court held to the contrary. All conceded that the underlying cause of the work stoppage was safety conditions in the work place, and so, once the Court determined that the dispute was required to be resolved by arbitration, it simply applied the *Boys Markets* holding and found that the work stoppage had been properly enjoined.

Obviously, this is a rationale that can apply only to work stoppages resorted to as a means of coercing an employer to give in to the employees' position regarding an underlying dispute between them. It does not apply here.

The Court below recognized that the work stoppage herein was caused, not by any underlying dispute between respondent and its employees, but by the appearance of foreign picket lines. It reasoned that the refusal of the employees to cross the foreign picket line itself posed an arbitrable issue, and, on this basis alone, held that an injunction should have issued. It did not—and it obviously *could not*—say that the work stoppage was "over" or was caused by a dispute between respondent and its employees, because there was no such dispute. Nor did it or could it say that the employees' refusal to cross the foreign picket line was intended to make respondent accede to anything—to their right to honor picket lines or to any other right which they might conceivably claim under the collective bargaining agreement.

In fact, the lower court's holding is simply incompatible with this Court's avowal of the narrowness of *Boys Markets* and the vitality of the Norris-LaGuardia Act. *Boys Markets* applies when the arbitrable grievance causes the stoppage, not when the stoppage itself creates the only dispute said to be arbitrable. If a refusal to cross a foreign picket line calls for injunctive relief on the ground that it poses an arbitrable issue (i.e., the question whether the stoppage itself is permissible), so would any other work stoppage whatsoever. Judge Smith in *Buffalo Forge* v. *United Steelworkers of America, supra,* eloquently underscored the importance of the distinction between cases where the strike sought to be enjoined was "over a grievance" and cases where the strike was "simply a manifestation of the striking workers' deference to other employees' picket lines:"

> This distinction is crucial in light of the need, recognized in *Boys Markets* and the *Sinclair Refining* dissent,

to reconcile the anti-injunction policy of Norris-LaGuardia with the pro-arbitration policy of the later act. If a strike not seeking redress of any grievance is enjoinable, then the policy of Norris-LaGuardia is virtually obliterated. For since a no-strike provision, if not in fact present in the employment contract, will be implied where the agreement sets up mandatory arbitration machinery, *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U.S. 95, 104-06 (1962), it is, as the Fifth Circuit has concluded, 'difficult to conceive of any strike which could not be so enjoined.' *Amstar Corp.* v. *Amalgamated Meat Cutters and Butchers Workmen of North America, AFL-CIO*, 468 F.2d 1372, 1373 (5th Cir. 1972). Undue expansion of the 'narrow' holding in *Boys Markets* may be avoided, on the other hand, by proper attention to the actual threat posed by strikes not over grievances with the employer to the policies promoted by §301 (a). A strike not seeking to pressure the employer to yield on a disputed issue is not an attempt to circumvent arbitration machinery established by the collective bargaining agreement. Accordingly, it does no violence to the federal pro-arbitration policy to require federal courts to refrain from enjoining such strikes. *See NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs, Parts and Garage Employees, Local Union No. 926*, 502 F.2d 321, 330-31 (3d Cir. 1974) (*en banc*) (Hunter, J. & Seitz, C.J., dissenting), *cert. denied*, 43 U.S.L.W. 3328 (Dec. 9, 1974); *Inland Steel Co.* v. *Local Union No. 1545, United Mine Workers of America*, 505 F.2d 293, 300-01 (7th Cir. 1974) (Fairchild, J., dissenting). (89 LRRM at 2305-2306)

Boys Markets contemplated only a narrow exception to Norris-LaGuardia for those work stoppages caused by underlying arbitrable disputes. The holding of the Court of Appeals necessarily involves an approach which is far more

sweeping, extending to every work stoppage which itself can be characterized as posing an arbitrable issue, regardless whether it arises "over" an arbitrable dispute. In the words of Judge Fairchild, such a holding would "permit the narrow exception created by *Boys Markets* to subsume the rule." *Inland Steel Co.* v. *Local Union 1545, United Mine Workers of America, supra,* 505 F.2d at 301.

As observed by Judge Hunter, dissenting in *NAPA Pittsburgh, supra,* the misapplication of *Boys Markets* to foreign picket stoppages does no service whatsoever to pro-arbitration policies:

> [A] broader reading of the *Boys Markets* holding would extend it into areas where the policy considerations that dictated that decision simply do not operate. If the arbitrable dispute is not a 'cause' of the work stoppage, then a concession on that dispute by the employer will not help to end the work stoppage. Under these circumstances, the work stoppage will exert no pressure on the employer to resolve the arbitrable issue short of arbitration. Thus, if this basic cause-effect relationship between the arbitrable issue and the strike is not present, the strike will not discourage arbitration and the policy that favors the arbitration of labor disputes will not be furthered by the issuance of an injunction. (502 F.2d at 330-31).

The essential distinction is further amplified by Judge Adams' dissent in *Island Creek, supra*:

> It was one thing to further the policy favoring arbitration of grievances conventionally submitted to arbitration, and to interpret the no-strike clause so as to permit that to be done. It is quite another thing to make it virtually impossible for union members to maintain their tradition of not crossing picket lines under a rationalization that the union, *sub silentio,* relinquished this valued right in favor of permitting an

arbitrator to decide whether an agreement not to honor a picket line should be read into the contract. (507 F.2d at 654-655).

The result reached by the Court below represents a complete departure from the narrow path of accommodation envisioned by the Court in *Boys Markets*, and generally from this Court's long-standing practice of accommodating the Norris-LaGuardia Act with other labor statutes and federal labor policy. *Note*, Accommodation of the Norris-LaGuardia Act to Other Federal Statutes, 72 Harv. L. Rev. 354 (1958). It is a departure which does no service whatsoever to the pro-arbitration policies which *Boys Markets* sought to protect. As observed by the Second Circuit in *Buffalo Forge* and the dissents of Judge Fairchild in *Inland Steel, supra*, and Judge Adams in *Island Creek, supra*, it is also a departure which leaves Norris-LaGuardia not simply accommodated but actually obliterated. It is a result which deserves both Taft-Hartley and Norris-LaGuardia, and which should therefore be reviewed and rejected by this Court.

III. THE DECISION BELOW CONFLICTS SQUARELY WITH RECENT DECISIONS OF THE COURTS OF APPEALS AND THE NATIONAL LABOR RELATIONS BOARD WHICH IMPLEMENT THE WELL-ESTABLISHED PRINCIPLE THAT HONORING A FOREIGN PICKET LINE IS CONDUCT PROTECTED BY THE NATIONAL LABOR RELATIONS ACT.

It is well-established law—indeed, the authorities are perfectly unanimous—that employees who honor a picket line at the place of their employment may do so as a matter of right under Section 7 of the National Labor Relations Act.[10] Any attempt by their employer to discharge or dis-

[10] *See, e.g., Kellogg Co.* v. *NLRB*, 457 F.2d 519 (6th Cir.), *cert. denied*, 409 U.S. 850 (1972); *Montana-Dakota Utilities Co.* v. *NLRB*, 455 F.2d 1088 (8th Cir. 1972); *NLRB* v. *Union Carbide Corp.*, 440

cipline them, on account of their refusal to cross to come to work, is an unfair labor practice.[11] Should discipline or discharge occur, the affected employees may call upon the coercive powers of the National Labor Relations Board, and the remedy of reinstatement with back pay will be enforced in the Courts of Appeals.

It is true that the right to refuse to cross a picket line is subject to waiver.[12] But since a federal statutory right is at stake, any waiver must be articulated in "clear and unmistakable language" appearing in the employees' collective bargaining agreement, and plainly "[s]ilence in the bargaining agreement on such an issue does not meet this test."[13] Thus, for example, waiver does not occur when the union agrees to a broad no-strike clause; this is not a sufficiently specific waiver and therefore the right to honor picket lines survives such a clause.[14] And quite obviously the complete absence of *any* no-strike or no-stoppage promise by the union means that the right to honor picket lines is left fully intact.

F.2d 54 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971); *NLRB* v. *Difco Laboratories*, 427 F.2d 170 (6th Cir.), *cert. denied*, 400 U.S. 833 (1970); *NLRB* v. *Southern Greyhound Lines*, 426 F.2d 1299 (5th Cir. 1970); *News Union of Baltimore* v. *NLRB*, 393 F.2d 673 (D.C. Cir. 1968); *Redwing Carriers, Inc.* 137 NLRB No. 162, 50 LRRM 1440 (1962).

[11] That is, the right to honor picket lines is within the broad protection of Section 7 of the National Labor Relations Act, 29 U.S.C. §157, and therefore employer interference with exercise of the right violates Sections 8(a)(1) and 8(a)(3), 29 U.S.C. §§158(a)(1) and (3), and also (in some circumstances) the first proviso of Section 8(b)(4), 29 U.S.C. §158(b)(4).

[12] *See, e.g., NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71 (1953).

[13] *Timken Roller Bearing Co.* v. *NLRB*, 325 F.2d 746, 751 (6th Cir.), *cert. denied*, 376 U.S. 971 (1964). *See also, e.g., Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 280-83 (1956); *NLRB* v. *Wisconsin Alum. Foundry Co.*, 440 F.2d 393, 399 (7th Cir. 1971).

[14] *See, e.g., Kellogg Co.* v. *NLRB*, 457 F.2d 519 (6th Cir.), *cert. denied*, 409 U.S. 850 (1972).

The decision below cannot be reconciled with the black-letter law of the National Labor Relations Act summarized in the last two paragraphs. More particularly and dramatically, the decision below collides with two recent decisions of the NLRB which build upon these premises.

In *Gary-Hobart Water Corp.*[15] and *Keller-Crescent Co.*,[16] the Board reaffirmed the undoubted first principle of this field of law:

> It is fundamental that the right to strike is guaranteed by the NLRA. This right is protected by law, whether the strike be for economic reasons, for the purpose of improving working conditions, *or for mutual aid and protection of employees of members of another union.* Thus, the right to engage in a sympathy strike or honor another union's picket line is also protected. However, the right to strike, including the right to engage in sympathy strikes or to refuse to cross another union's picket line, may be waived by appropriate provisions in a collective bargaining agreement.
>
> While statutory rights may be waived, however, the Board and the Courts have repeatedly emphasized that such waivers will not be readily inferred, and there must be a clear and unmistakable showing that waiver occurred. And the principle that the waiver of statutory rights must be clear and unequivocal applies to the right to strike, including the right to engage in a sympathy strike or to honor the picket line of another union. (86 LRRM at 1213). (Emphasis in original).

See also, Keller-Crescent Co., 217 NLRB No. 100 at 7-9, 89 LRRM at 1204. In both cases the question was whether waiver had occurred. Each bargaining agreement contained (1) a mandatory arbitration clause and (2) an express promise not to engage in work stoppages over dis-

[15] 210 NLRB No. 87, 86 LRRM 1210, *enf'd sub nom. Gary-Hobart Water Corp.* v. *NLRB*, 511 F.2d 284 (7th Cir. 1975).

[16] 217 NLRB No. 100, 89 LRRM 1201 (1975).

putes subject to arbitration. In both cases the Board held that notwithstanding the contractual language no waiver of the right to honor picket lines could be inferred.

The Board's analysis of the no-strike clause in *Gary-Hobart* speaks directly to the present case:

> The General Counsel and Charging Party contend that the waiver of the right to strike is only as extensive as the scope of the grievance and arbitration procedure of the contract in question. They argue that when the subject of the dispute is not cognizable under the grievance-arbitration procedure the quid pro quo for the no-strike clause is no longer present and the no-strike clause does not apply. We agree. The Board and the courts, including the Supreme Court, have indicated no-strike provisions will not be enforced where the subject of the dispute is not covered by the grievance-arbitration procedure. (86 LRRM at 1213).[17]

Then the Board underscored the essential point: that a work stoppage caused solely by a foreign picket line cannot

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[17] The Board continued:

> The Supreme Court has spoken to the issue primarily in suits under Section 301 of the Act. In Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co., 369 U.S. 95, 105, the Court said that 'a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement.' However, it added that such a no-strike agreement is not to be implied 'beyond the area which has been agreed will be exclusively covered by compulsory arbitration.' Likewise, in Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, also a section 301 injunction suit, Justice Brennan, for the majority, in discussing when a strike should be enjoined by a district court, stated that a strike would be enjoined (unprotected) only if 'over a grievance which both parties are contractually bound to arbitrate.' And in the Supreme Court's most recent pronouncement on the scope of an arbitration provision, again in a Section 301 context (Gateway Coal Co. v. United Mine Workers of America, et al., 410 U.S. 953), the Court stated, 'No obligation to arbitrate a labor dis-

be thought to offend or derogate from the duty to arbitrate work place grievances, simply because there is *no underlying grievance* at the root of such a stoppage that might be resolved by arbitration.

> The strike by the clerical unit [i.e., the employees who honored the foreign picket line] was not over a grievance which the parties were contractually bound to arbitrate. Rather, the strike itself precipitated the dispute—the validity under the Union's no-strike obligation of the employee-members honoring the . . . picket line. Put differently, the dispute was between the [picketing] unit and the Respondent and therefore not resolvable under the clerical unit's grievance procedure. (86 LRRM at 1214).

In short, only those stoppages caused by *underlying work place grievances* violate the arbitration pledge; the honoring of a foreign picket line by definition does not involve any underlying grievance subject to arbitration; therefore employees who refuse to cross must be protected by the Board against the employer's attempt to discourage exercise of their statutory right.[18]

> pute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so.'
>
> . . .
>
> [A]t least where statutory rights are involved, unless they are specifically waived, the contracting union does have the right to strike in connection with a dispute not subject to grievance-arbitration, for the no-strike clause is only as extensive as the grievance-arbitration procedure. (86 LRRM at 1213-14).

[18] This reasoning was fully approved by the Seventh Circuit decision enforcing the NLRB's order in *Gary-Hobart:*

> The refusal to dishonor another union's picket line or engaging in a sympathy strike in connection with another local's strike are not disputes or controversies arising under or in connection with the first local union's agreement and are therefore neither arbitrable nor subject to the no-strike provisions. (511 F.2d at 288).

An astonishing and intolerable conflict arises from the divergent views of the NLRB and the court below. The conflict is made manifest by a simple example: Suppose that employees decide to honor a foreign picket line and that their bargaining agreement contains both an arbitration clause and a no-strike clause. The employer seeks an injunction against the stoppage and also disciplines employees who engaged in the stoppage. A district court within the Third, Fourth, and Seventh Circuits now is obliged to find the employees' conduct *unlawful* and issue an anti-strike injunction under Section 301 of the Labor-Management Relations Act. The NLRB is obliged to find the employees' conduct *protected* and to order the employer to cease and desist from all attempts to discourage exercise of rights under the National Labor Relations Act. The district court would reason that it is a debatable issue whether the contract waives the employees' right to honor picket lines, that this issue should have been sent to arbitration, and therefore the stoppage breaches the arbitration duty. The Board would reason that no waiver can be inferred absent clear and unmistakable language, that a picket-line stoppage cannot possibly violate the arbitration duty because an underlying grievance is absent, and therefore the stoppage is fully protected. Amazingly, the Courts of Appeals mentioned are obliged by their own decisions *both* to affirm the district court injunction *and* to enforce the NLRB's cease-and-desist order.[19]

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[19] For the Fourth Circuit, compare *NLRB* v. *Union Carbide Corp.*, 440 F.2d 54 (1971) with cases from that Circuit cited in Part I, *supra*. For the Seventh Circuit, compare *Gary-Hobart Water Corp.* v. *NLRB*, 511 F.2d 284 (1975), with cases from that Circuit cited in Part I, *supra*. For the Third Circuit, see *Island Creek Coal Co.* v. *UMWA*, 507 F.2d 650, 652 (1975).

CONCLUSION

For all the reasons stated herein, it is respectfully prayed that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1323

ARMCO STEEL CORPORATION, ET AL.,
Appellants,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Appellees.

No. 74-1324

UNITED STATES STEEL CORPORATION,
Appellant,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Appellees.

Before HAYNSWORTH, Chief Judge, RUSSELL and WIDENER, Circuit Judges.

RUSSELL, Circuit Judge:

Protesting certain state and federal regulations on the allocation, distribution and sale of gasoline during the oil crisis in early 1974—regulations which it was asserted unfairly interfered with their travel to and from work—certain unidentified coal miners allegedly affiliated with various locals of the United Mine Workers, but not employees of either of the plaintiffs in these two actions, set up picket lines about the mines operated by the plaintiffs United States Steel Corporation and Armco Steel Corporation. The plain-

tiffs' employees, all of whom were represented by the United Mine Workers of America under the terms of the National Bituminous Coal Wage Agreement of 1971, refused to cross these picket lines, thereby causing a work-stoppage at the mines of the two plaintiffs.

(a) United States Steel Corporation *v.* United Mine Workers

The plaintiff United States Steel promptly filed in the District Court an action under Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185, seeking (1) to enjoin the work-stoppage as allegedly in violation of the Bituminous Coal Wage Agreement, (2) to require compliance by the defendants with the arbitration procedures of that agreement, and (3) for damages. The defendants in this action are the United Mine Workers of America, District No. 29 of the national union and the six locals, representing the employees at the plaintiff's several mines. Contemporaneous with the filing of the action, it moved before the District Court for a temporary injunction against the work-stoppage. After hearing, the District Court entered an order denying both preliminary and permanent injunctive relief. In so doing, it held that while the plaintiff was "suffering irreparable damage and harm from refusal of the members of said defendant Local Unions to cross picket lines maintained by unidentified pickets," the work-stoppage did not represent "an arbitrable matter under the wage agreement" and would not provide a basis for injunctive relief under *Boys Markets* v. *Clerks Union* (1970) 398 U.S. 235.[1] It is from that order that the United States Steel Corporation prosecutes its appeal. *See,* Section 1291, 28 U.S.C.

(b) Armco Steel Corporation *v.* United Mine Workers

In its original complaint, filed about the same time as that of the United States Steel, Armco Steel set forth three

[1] On application under FRAP Rule 8, an injunction in both cases pending appeal was granted by a member of this Court.

counts: one under the Sherman Anti-Trust Act, 15 U.S.C., §1, *et seq.*, a second, under the Emergency Petroleum Allocation Act of 1973 (PL. 93-239) and the Economic Stabilization Act of 1970, as amended (12 U.S.C., §1904), and a third, a common law count for tortious interference with employees contrary to state law. After hearing, the District Court held it was without jurisdiction to entertain counts one and two[2] and jurisdiction over count three being pendent, it dismissed the third count as well. At this point Armco moved for and was granted leave to amend by adding a fourth count, setting up a claim under Section 301 of the Labor-Management Relations Act of 1947, as amended, similar to that asserted by the United States Steel. Following this amendment, Armco applied for a temporary injunction on the same grounds pressed by United States Steel and the District Court made a similar ruling. Armco has appealed both the dismissal of its anti-trust action as well as the dismissal of its application for relief under its fourth count.

(c) Consolidation for Appeal of Two Cases

Since the appeals of both United States Steel and Armco have the same factual background and, at least so far as the actions under Section 301 are concerned, present similar issues, we consolidated the appeals for hearing and shall decide the two appeals in a single opinion.

I.

Section 301 Actions

First consideration will be given to the Section 301 actions and the denial of relief therein by the District Court in both

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[2] Appeal from the dismissal of the second count is to the Temporary Emergency Court of Appeals. (Emergency Petroleum Allocation Act of 1973, § 5, incorporating by reference § 211(b)(c) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 (note)). Armco has filed an appeal to that Court and that appeal is pending.

cases on like grounds. In the United States Steel injunctive relief only was denied. In Armco all relief was denied.

In *Boys Markets* it was established that a District Court, subject to the traditional principles of equity, has jurisdiction under Section 301 to grant injunctive relief against a work-stoppage on the part of the union if the collective bargaining agreement contains a mandatory arbitration procedure and the work-stoppage is over a grievance or involves a matter which the parties are contractually bound to arbitrate. *Monongahela Pow. Co.* v. *Loc. No. 2332* (1973) 484 F.2d 1209, 1214, n. 14; *Wilmington Shipping Company* v. *International Longshoremen's Assn.* (4th Cir. 1974) —— F.2d ——; *cf., Pilot Freight Carriers, Inc.* v. *International Brotherhood of Teamsters* (4th Cir. 1974) 497 F.2d 311. The defendants, however, contend that *Boys Markets* is inapposite in these cases for three reasons: 1. The Bituminous Coal Agreement of 1971 does not include a specific "no-strike" provision or promise not to engage in any work-stoppage which, under their view of *Boys Markets,* is essential to injunctive relief; 2. The dispute, giving rise to the work-stoppage, was not arbitrable; and 3. The refusal of workers to violate a picket line may not be enjoined.

The first objection of the defendants may be quickly disposed of. An agreement not to strike and not to engage in a work-stoppage over any arbitrable issue may be implied from a mandatory arbitration provision in a labor-management contract. This was specifically held in *Gateway Coal Co.* v. *United Mine Workers* (1974) 414 U.S. 368. There the Court said:

> "Although the collective-bargaining agreement in *Boys Markets* contained an express no-strike clause, injunctive relief also may be granted on the basis of an implied undertaking not to strike. In *Teamsters Local* v. *Lucas Flour Co.,* 369 U.S. 95 (1962), the Court held that a contractual commitment to submit disagree-

> ments to final and binding arbitration gives rise to an implied obligation not to strike over such disputes." (p. 381)

It should be noted that the 1968 agreement involved in *Gateway* has like language to the 1971 agreement involved here. And in its decision construing that earlier provision, the Court held categorically that such Agreement incorporated by implication a no-strike provision and a promise to submit to binding arbitration any arbitrable dispute or issue. It is true the obligation found by the Court to exist was an implied and not an express obligation. But, as *Gateway* decided, an implied obligation not to strike is as effective as an express obligation in supporting jurisdiction under *Boys Markets*. Actually, *Gateway's* holding that an implied agreement not to strike is as effective as an express one is little more than a reiteration of what had been indicated in *Boys Markets* itself. There, the Court, in stating its rule, upheld jurisdiction to grant injunctive relief on the basis of "a no-strike obligation, express or implied", thereby equating "implied" with "express" obligations (398 U.S. at p. 248). It follows, therefore, that there was an implied obligation on the Union under this Agreement to submit to mandatory arbitration any arbitrable issue between the Union and the employers and that this "implied" obligation was as good as an "express" provision, so far as the application of *Boys Markets* was concerned.

Accepting the postulate that there was an obligation under the Agreement involved here, to submit any arbitrable issue to mandatory arbitration, the next issue is: Was the refusal of the members of the Union to cross the picket lines an arbitrable issue? *Monongahela Pow. Co.* v. *Local No. 2332, supra* (484 F.2d 1209), seems conclusive that it was. In that case, the Court stated that a court, in construing a labor agreement, should "resolve all doubt in favor of arbitration, and order arbitration 'unless it may be said with positive assurance that the arbitration clause is not suscepti-

ble of an interpretation that covers the asserted dispute.' " (at 1213). Following this premise, the Court held that "a union's no-strike commitment can give rise to an arbitrable dispute warranting judicial intervention in the form of a labor injunction." [3] The dispute there involved was the same as here, *i.e.*, the arbitrability of the refusal of members of a local union to cross picket lines established by another local. The picket lines, which the members of the defendant local were honoring in that case, were established for the purpose of showing "sympathy and solidarity" with employees on strike in another Division of the employer and represented by another local. The objective of the picketing was as unrelated and foreign to the actual working conditions of the employees at the installation where the members of the defendant Union worked as was the objective of the picketing in these cases. And the contractual obligation to arbitrate was as definite as it was in *Monongahela*. Thus, the Agreement in these cases included a positive affirmance on the part of all parties "that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement Disputes' article of this agreement unless national in character * * *." Under the "Settlement of Disputes" provision of the Agreement, the parties agreed for final and binding arbitration of any dispute about matters specifically mentioned in the Agreement and "about matters not specifically mentioned in this agreement", particularly "should any local trouble of any kind arise at the mine." And, in order to make the arbitration provision more all-inclusive, the Agreement calls for binding arbitration of any controversy "as to the meaning and application of the provisions of this agreement." The only difference between this Agreement and the labor contract in-

[3] *See, Wilmington Shipping Company* v. *International Longshoremen's Association, supra* (Adams, J., concurring), summarizing the holding in *Monongahela*.

volved in Monongahela is that in the former there is an implied no-strike provision and in the latter an express no-strike provision. *Gateway,* however, makes such difference immaterial. *Monongahela* and *Wilmington Shipping Company,* which reaffirmed *Monongahela,* establish, so far as this Circuit is concerned, the arbitrability of the grievance here.

Since argument of these appeals, counsel for the Union has called to our attention *Gary-Hobart Water Corporation* (1974) 210 N.L.R.B. No. 87. We find nothing in that decision at variance with the above conclusions. The Board recognized, as we held *Monongahela,* that the right of employees "to refuse to cross another union's picket line, may be waived by appropriate provisions in a collective-bargaining agreement." It found authority for that conclusion, as we did, in *N.L.R.B.* v. *Rockaway News Supply Co.* (1953) 345 U.S. 71. It held, of course, that the waiver was "only as extensive as the scope of the grievance and arbitration procedure of the contract in question" and that "when the subject of the dispute is not cognizable under the grievance-arbitration procedure the *quid pro quo* for the no-strike clause is no longer present and the no-strike clause does not apply." This is but another way of expressing the principle that *Boys Markets* applies only when the grievance is arbitrable. But the statement of such a principle presents no impediment to the plaintiffs' demand for injunctive relief in these cases: The arbitrability of the grievance in these cases is, as we have already said, clear under the Agreement. There is thus nothing in *Gary-Hobart* that militates against the conclusions reached above.

The final argument of the defendants that the right of employees to honor a picket line, even in the face of a no-strike provision in the collective-bargaining agreement executed on behalf of such employees, is federally protected and may not be the subject of injunctive relief was answered in *Monongahela,* where, relying on *N.L.R.B.* v. *Rockaway*

News Supply Co., supra, we said that the "statutory right of employees to refuse to cross a picket line * * * may be waived * * * by the action of their union in agreeing to a no-strike clause." (p. 1214).

The appellees do not appear to dispute nor could they well dispute that the plaintiffs have established their right to injunctive relief under the traditional equity rules. The District Court found that the defendants had engaged in a work-stoppage and were likely to continue to do so unless restrained. It concluded, too, that the plaintiffs, as a result of such work-stoppage were suffering irreparable injury for which they had no adequate remedy at law. Those findings, along with our conclusion that the dispute centering on the work-stoppage, contrary to the conclusion reached by the District Court, was arbitrable, entitled the plaintiffs to injunctive relief.[4] The denial of temporary injunctive relief and the dismissal of the actions for injunctions and damages were accordingly error.

II.

Armco's Anti-Trust Action

Turning now to the anti-trust action pressed by Armco: The District Court correctly dismissed so much of Armco's original and amended complaint as sought to set up a claim under the anti-trust laws against the defendants. In *Apex Hosiery Co.* v. *Leader* (1940) 310 U.S. 469, the Court emphasized that the Sherman Act had never been applied "in any case, whether or not involving labor organizations or activities, unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services and finally this Court has refused to apply the Sherman Act in cases like the present in

[4] The right to recover of the defendants in damages is not before us and we express no opinion thereon. For an execllent discussion of such, *see* Note, 6 *Ga. L.* Rev. 797 (1972).

which local strikes conducted by illegal means in a production industry prevented interstate shipment of substantial amounts of the product but in which it was not shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way." [5] There is no allegation or contention that the strike of the unions involved, however illegal it may have been, was for the purpose of restraining commercial competition in the marketing of goods or services, or that it had operated to restrain commercial competition in some substantial way. There was accordingly no cause of action stated under the Sherman Act.

Armco's reliance on *Los Angeles Meat & Provision Drivers Union* v. *United States* (1962) 371 U.S. 94 and *Columbia River Packers Association, Inc.* v. *Hinton* (1942) 315 U.S. 143 is misplaced. In the former case, the Court expressly found that the case "was not one 'involving or growing out of any labor dispute,' but one involving an illegal combination between businessmen and a union to restrain commerce. In such a case, as *Allen Bradley Co.* clearly held, neither the Norris-LaGuardia Act nor the labor exemption provisions of the Clayton Act are applicable." (371 U.S. at 102) In *Hinton,* the dispute was one "among businessmen over the terms of a contract for the sale of fish"; it was one "altogether between fish sellers and fish buyers." The sellers of fish were "not employees of the petitioners or of any other employer, nor do they seek to be." The controversy was plainly not a labor dispute and could not qualify under the Norris-LaGuardia exemption.

Conclusion

The District Court was in error in refusing the plaintiffs temporary injunctive relief and in dismissing the actions for a permanent injunction under the rule in *Boys Markets;*

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[5] 310 U.S. at pp. 495-6-7.

it, however, properly dismissed the cause of action asserted by the plaintiff Armco under the anti-trust law. The Court also erred in dismissing the cause of action for damages under §301 in the Armco case. Since we hold a cause of action was stated in count four in the Armco amended complaint, the District Court on remand should reconsider its ruling dismissing the pendent state law count in that case. *Mine Workers* v. *Gibbs* (1966) 383 U.S. 715.

These actions are accordingly affirmed in part, reversed in part, and remanded with directions in conformity with the foregoing conclusions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA

At Charleston

ARMCO STEEL CORPORATION, ET AL.,
each a corporation,

Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants.

Civil Action No. 74-79

On March 4, 1974, came the plaintiffs by David D. Johnson, Forrest H. Roles, and Stephen R. Crislip, and also came the labor organization defendants other than the UMWA and District 17, United Mine Workers of America, by Bruce Boyens, and this case came on for hearing upon the plaintiffs' motion for a temporary restraining order. The Court, having reviewed the pleadings and heard the arguments of counsel took said motions under advisement so that the Court might review the statutes and cases cited to it by the parties.

Thereupon, on March 6, 1974, again came the plaintiffs by counsel, as aforesaid, and also came the defendants, United Mine Workers of America, specially appearing by Joseph A. Yablonski, and the other labor organization defendants by M. E. Boiarsky and Bruce Boyens, and the Court, for the reasons appearing in its order entered on March 6, 1974, enjoined the individual defendants and the

class of pickets whom they represent, from certain actions described in that order, and reserved judgment upon the remaining relief.

Thereupon, the Court conducted a hearing upon the plaintiffs' motion for a temporary restraining order against the local union defendants. Upon consideration of the said motion, the complaint, and the plaintiffs' offer of proof of the allegations contained in the complaint, the arguments of counsel and the case authority cited by counsel, the Court was of the opinion that it did not have jurisdiction to act under the Emergency Petroleum Allocation Act of 1973, nor jurisdiction to act against the labor organization defendants under the Sherman Anti-Trust Act, 15 U.S.C. §§1-7. For those reasons, the Court ORDERED that the said motion of the plaintiffs for a temporary restraining order against the local unions be, and the same hereby is, denied.

Thereupon, upon further consideration, the Court ORDERED that the complaint be, and the same hereby is dismissed as to the labor organization defendants, with leave in the plaintiffs to amend.

On March 7, 1974, came the plaintiffs and tendered and asked leave to file their amended complaint, and upon consideration of the same, the Court finding it proper to do so, ORDERED the complaint to be and the same hereby is filed.

Thereupon, the plaintiffs again moved for temporary restraining order against the local union defendants. Upon consideration of the verified amended complaint, the Court was of the opinion that it did not have jurisdiction to enter an injunction under the fourth count of said complaint for the reason that the dispute, if any, existing at the plaintiffs' mines is not arbitrable under the labor contract sued upon, and therefore ORDERED that the plaintiffs' motion be, and it hereby is denied.

Upon further consideration of said amended complaint, the Court was of the opinion that as the dispute described was not arbitrable under the contract, that the fourth count of said complaint did not state a cause of action. Therefore, for this reason and the reasons above stated as to Counts I and II, and the fact that the Court's jurisdiction as to Count III of the complaint is only pendent to the other counts, the Court ORDERED the amended complaint to be, and the same hereby is dismissed as to the labor organization defendants.

Because of the extreme importance of this case, and the nature of the injury to the plaintiffs and the public alleged by the complaints, the Court further ORDERED that this order be entered as a final judgment as to the plaintiffs' claims for relief against the labor organization defendants under the provisions of Rule 54(b) of the Federal Rules of Civil Procedure, there being no just reason for delay of entry of a final judgment and review thereof.

Entered this 7th day of March, 1974

/s/ Dennis R. Knapp
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA AT BLUEFIELD

Civil Action No. 74-18-BL

UNITED STATES STEEL CORPORATION,
Plaintiff,

v.

UNITED MINE WORKERS OF AMERICA;
DISTRICT NO. 29, UNITED MINE WORKERS
OF AMERICA; and UNITED MINE WORKERS
OF AMERICA LOCAL UNIONS NOS. 7635, 1628,
7906, 7633, 9534 and 7905,
Defendants.

TEMPORARY RESTRAINING ORDER

NOW, TO-WIT, this 25th day of February, 1974, this cause came on to be heard on the motion of plaintiff for a temporary restraining order and on the verified complaint filed herein, and it appearing to the court therefrom that there is danger of immediate and irreparable injury, loss and damage being caused to the plaintiff before notice can be served and a hearing had on plaintiff's motion for a preliminary injunction for the reason that such injuries are liable to occur before a hearing upon notice can be had because an interference with work at the plaintiff's mine and preparation plant is immediate and its continuance imminently threatened by the defendants and the same will cause a loss of coal production at a time when the supply of coal is critical, and the number and residence of defendants will make service of notice a time-consuming matter, it is

ORDERED:

1. That a temporary restraining order be and hereby is issued, restraining the defendant Local Unions Nos. 7635, 1628, 7906, 7633, 9534 and 7905, and each and every person who is now or may become a member thereof, and all persons acting in concert with them or on their behalf, from engaging or continuing to engage in any strike or other work stoppage, at plaintiff's said Mines Nos. 2, 4, 9, 10, 14 and contour, said Alpheus Preparation Plant and Maintenance shop, all in McDowell County, West Virginia, over any dispute, disagreement, or other difference arising out of a matter which is properly subject to the grievance and arbitration procedures of the 1971 Agreement, but this order shall not be construed to require any member of any of said local unions to work who is prevented from doing so by lack of fuel or transportation and

2. Provided further that the foregoing temporary restraining order shall not be construed to require members of said defendant Locals Nos. 7635, 1628, 7906, 7633, 9534 and 7905, or persons who may become members thereof to cross an actual picket line established by persons who are not members of defendant Local Unions, but should any member of said defendant Local Unions fail to work when work is posted and available for the alleged reason that he was prevented from doing so by other persons picketing at plaintiff's mine, then in that event the burden shall be on such member of defendant Local Unions who has failed to work to prove that pickets were the real cause of his failure to report to work and to work.

3. That said defendant Locals 7635, 1628, 7906, 7633, 9534 and 7905, and their officers, representatives and members, be directed to take all action which may be necessary to assure compliance with the terms of the 1971 Agreement.

4. It is further ordered that any person who is not a member of said defendant Local Unions and who receives notice of this order shall cease and desist and is enjoined from

any action designed or calculated to induce, persuade, order, cause or bring about the failure or refusal of any member of said defendant Local Unions Nos. 7635, 1628, 7906, 7633, 9534 and 7905 to report for work or to work, or to cause or bring about a work stoppage at plaintiff's mines or preparation plant.

On condition that a bond be filed by plaintiffs herein in the sum of $5,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, said bond to be approved by this court or by the clerk of this court; and it is further

Ordered, that this order expire at 1:30 o'clock, P.M., D.S.T., on March 7, 1974, unless within said time it is for good cause shown extended for a longer period, or unless defendants consent that it may be extended for a longer period; and it is further

Ordered that plaintiff's motion for a preliminary injunction be set for hearing on March 6, 1974, at 11:30 o'clock, D.S.T. in the forenoon of that day or as soon thereafter as counsel can be heard, in the United States District Courtroom in the City of Charleston, State of West Virginia.

Ordered that a copy of this order be served by the United States Marshal upon each defendant forthwith.

This order issued at 3:25 o'clock, P.M., D.S.T. this 25th day of February, 1974.

/s/ K. K. Hall
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA AT BLUEFIELD

Civil Action No.74-18-BL

UNITED STATES STEEL CORPORATION,
Plaintiff,

v.

UNITED MINE WORKERS OF AMERICA;
DISTRICT NO. 29, UNITED MINE WORKERS
OF AMERICA; and UNITED MINE WORKERS
OF AMERICA LOCAL UNIONS NOS. 7635, 1628,
7906, 7633, 9534 and 7905,
Defendants.

On this 6th day of March, 1974, came again the plaintiff by Charles M. Love, its attorney, and also came the defendant District No. 29, United Mine Workers of America and the defendant United Mine Workers of America Local Unions Nos. 7635, 1628, 7906, 7633, 9534 and 7905, by Leo Catsonis, their attorney and hearing was held on plaintiff's application for preliminary injunction.

And the Court having all evidence offered by the parties finds that the hearing on the preliminary injunction constitutes the final hearing on the merits with respect to the company's application for injunctive relief, the Court finds and orders:

1. That no member of defendant Local Unions has been shown to be unable to report for work because of lack of gasoline.

2. That plaintiff is suffering irreparable damage and harm from refusal of the members of said defendant Local Unions to cross picket lines maintained by unidentified pickets, but

3. That the refusal of the members of the defendant Local Unions to cross said picket lines is not an arbitrable matter under the wage agreement and further that no arbitrable matter under the Wage Agreement is alleged or proved.

4. That plaintiff's application for a preliminary injunction should be and hereby is denied and that part of plaintiff's complaint is dismissed.

ENTER: March 12, 1974

/s/ K. K. Hall
United States District Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BUFFALO FORGE COMPANY,

Appellant,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, *et al.*,

Appellees.

No. 74-2698

Before KAUFMAN, *Chief Judge,* SMITH and TIMBERS, *Circuit Judges.*

OPINION OF THE COURT

SMITH, *Circuit Judge.*

This appeal raises a narrow but significant question of labor law of first impression in this court: If a union enters into a collective bargaining agreement establishing a mandatory arbitration procedure and including a no-strike clause and then later strikes *solely* out of deference to another union's lawful picket line at a place of employment common to the two unions, does a federal district court have authority under §301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a),[1] to enjoin the

[1] §185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

strike or is it precluded from granting injunctive relief by §4 of the Norris-LaGuardia Act of 1932, 29 U.S.C. §104?[2] Resolution of this issue requires interpretation of *Boys Market, Inc.* v. *Retail Clerks Union, Local 770,* 398 U.S. 235 (1970), where the Supreme Court set forth a general standard for reconciling the competing demands of the two statutory provisions in the context of a strike over a grievance which the parties are bound by agreement to submit to arbitration. In the case before us, the United

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[2] §104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following act:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

States District Court for the Western District of New York, John T. Curtin, *Chief Judge,* determined that under *Boys Market* it was deprived of jurisdiction by §4 of the Norris-LaGuardia Act to issue a preliminary injunction sought by Buffalo Forge Company against the work stoppage generated by the defendant unions' order to its members to observe other employees' lawful picket line; the unions' obligations under the preexisting collective bargaining agreements to resolve disputes with management through a mandatory six-step settlement procedure culminating in arbitration and to refrain from authorizing strikes were deemed not controlling in light of Congress' stated antipathy to injunctions in §4. 386 F.Supp. 405 (1974). After reviewing the divergent authority on the issue presented by this case,[3] we are convinced that Chief Judge Curtin has correctly construed the import of *Boys Market* and therefore affirm the order below.[4]

The United Steelworkers of America and two of its locals

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[3] Cases supporting the district court's holding in this case include *Amstar Corp.* v. *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO,* 468 F.2d 1372 (5th Cir. 1972); *General Cable Corp.* v. *The International Brotherhood of Electrical Workers, Local Union 1644, AFL-CIO,* 331 F.Supp. 478 (D. Md. 1971); *Simplex Wire and Cable Co.* v. *Local 2208 of the International Brotherhood of Electrical Workers, AFL-CIO,* 314 F.Supp. 885 (D. N.H. 1970). Contrary authority are *Napa Pittsburgh, Inc.* v. *Automotive Chauffeurs, Parts and Garage Employees, Local Union No. 926,* 502 F.2d 321 (3d Cir. 1974) *(en banc), cert. denied,* 43 U.S.L.W. 3328 (Dec. 9, 1974); *Monongahela Power Co.* v. *Local No. 2332 International Brotherhood of Electrical Workers, AFL-CIO-CLC,* 484 F.2d 1209 (4th Cir. 1973); *Inland Steel Co.* v. *Local Union No. 1545, United Mine Workers of America,* 505 F.2d 293 (7th Cir. 1974); *Barnard College in the City of New York* v. *Transport Workers Union of America, AFL-CIO,* 372 F.Supp. 211 (S.D.N.Y. 1974).

[4] The appellees also urge an alternative ground for affirmance: that the appellant is not entitled to injunctive relief because it has not made "every reasonable effort" to settle the dispute by negotiation, as required by 29 U.S.C. §108. Since we concur in the district court's basis for denying the preliminary injunction, we need not reach the merits of this contention.

represent the production and maintenance employees of Buffalo Forge Company, a manufacturing and sales concern with three plants and offices in or nearby Buffalo, N.Y. The same international union and two other locals represent the company's office clerical and technical employees. On November 16, 1974, in negotiating their first collective bargaining agreement with Buffalo Forge, the unions representing the office clerical and technical employees went out on strike and began picketing all three of the company's Buffalo area sites. On November 18, the production and maintenance employees at one of the plants refused for the day to cross the picket lines. Three days later, the unions representing the production and maintenance employees at the three plants called a work stoppage at all the plants, which gave rise to this suit for damages and injunctive relief by Buffalo Forge against these unions and various named officers and agents of the unions. On December 13, the district court denied the company's request for a preliminary injunction and the instant appeal followed, 28 U.S.C. §1292(a)(1).[5] The work stoppage then terminated on the next regular work day after the district court's order. The controversy remains a live one, however, for the office clerical and technical employees are still on strike and so long as their picketing continues, the work stoppage under review may, as stipulated by the parties, "be resumed at any time in the near future."[6]

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[5] §1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

* * *

[6] Joint Appendix at 2a.

In *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962), the Supreme Court found that §301(a) of the Labor Management Relations Act, which vests jurisdiction in federal district courts over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry representing commerce," in no way further qualifies the preexisting nonabsolute bar established by §4 of the Norris-LaGuardia Act to federal court injunctions "in any case involving or growing out of any labor dispute." The dissenting justices contended that the majority's decision was inconsistent with the strong congressional policy favoring settlement of labor-management differences by arbitration and with *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960), and other recent Supreme Court cases attempting to give full play to that policy. Writing for the *Sinclair Refining* dissenters, Mr. Justice Brennan suggested an accommodation between the two statutory provisions:

> A District Court entertaining an action under §301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more

> from the denial of an injunction than will the union from its issuance.

Sinclair Refining, supra, 370 U.S. 195 at 228 (emphasis in original). Eight years later in *Boys Market,* Mr. Justice Brennan made the above suggestion the core of his majority opinion overruling *Sinclair Refining. Boys Market, supra,* 398 U.S. 235 at 254.

In assessing the extent to which §301(a) modified the anti-injunction policy of Norris-LaGuardia, we base the tenor of our inquiry on the Court's emphasis in *Boys Market* on the narrowness of its holding in favor of injunctive relief. *Id.* at 253. *Compare Emery Air Freight Corp.* v. *Local Union 295,* 449 F.2d 586, 588 (2d Cir. 1971). In narrowly construing the exception to §4 of the Norris-LaGuardia Act carved out by §301(a) in the view of the *Boys Market* Court, then, we take particular note of the various indications in *Boys Market* and in the *Sinclair Refining* dissent upon which the latter drew that only strikes *over a grievance* which the union has agreed to arbitrate are within the scope of the exception. *See, e.g., Boys Market, supra,* 398 U.S. at 248, 254; *Sinclair Refining, supra,* 370 U.S. 195 at 217-18, 224-25, 228. The strike at issue in the instant case is not over a grievance with Buffalo Forge but instead is simply a manifestation of the striking workers' deference to other employees' picket lines.

This distinction is crucial in light of the need, recognized in *Boys Market* and the *Sinclair Refining* dissent, to reconcile the anti-injunction policy of Norris-LaGuardia with the pro-arbitration policy of the later act. If a strike not seeking redress of any grievance is enjoinable, then the policy of Norris-LaGuardia is virtually obliterated. For since a no-strike provision, if not in fact present in the employment contract, will be implied where the agreement sets up mandatory arbitration machinery, *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v.

Lucas Flour Co., 369 U.S. 95, 104-06 (1962), it is, as the Fifth Circuit has concluded, "difficult to conceive of any strike which could not be so enjoined." *Amstar Corp.* v. *Amalgamated Meat Cutters and Butchers Workmen of North America, AFL-CIO*, 468 F.2d 1372, 1373 (5th Cir. 1972). Undue expansion of the "narrow" holding in *Boys Market* may be avoided, on the other hand, by proper attention to the actual threat posed by strikes not over grievances with the employer to the policies promoted by §301(a). A strike not seeking to pressure the employer to yield on a disputed issue is not an attempt to circumvent arbitration machinery established by the collective bargaining agreement. Accordingly, it does no violence to the federal pro-arbitration policy to require federal courts to refrain from enjoining such strikes. *See Napa Pittsburgh, Inc.* v. *Automotive Chauffeurs, Parts and Garage Employees, Local Union No. 926*, 502 F.2d 321, 330-31 (3d Cir. 1974) *(en banc)* (Hunter, *J.* & Seitz, *C.J.*, dissenting), *cert. denied*, 43 U.S.L.W. 3328 (Dec. 9, 1974); *Inland Steel Co.* v. *Local Union No. 1545, United Mine Workers of America*, 505 F.2d 293, 300-01 (8th Cir. 1974) (Fairchild, *J.*, dissenting).

Since the work stoppage under review is motivated solely by respect for other employees' picket lines[7] and plainly is not aimed at resolving an existing dispute by extra-arbitral means, the district court's order denying a preliminary injunction gave effect to §4 of the Norris-LaGuardia Act without disservice to the policies informing §301(a) of the Labor Management Relations Act. Chief Judge Curtin's application of the two provisions to the context before him

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[7] In the district court, Buffalo Forge claimed that the work stoppage was at least in part a protest against truck driving assignments to the production and maintenance employees. The district court determined that this claim was unsupported by the evidence before it, and the appellant expressly disclaims seeking to disturb the district court's finding on this appeal. Brief for Appellant at 10.

comported with the Supreme Court's direction to district courts in its *Boys Market* opinion to reconcile the two provisions rather than simplistically read a repeal of §4 into the later enactment.

The order of the district court denying a preliminary injunction is therefore affirmed.

Affirmed.

APPENDIX F

Section 4 of Norris-LaGuardia Act, 29 U.S.C. 104

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Section 7 of National Labor Relations Act, as amended, 29 U.S.C. 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Sections 8(a)(1) and (3) of National Labor Relations Act, as amended, 29 U.S.C. 158(a)(1) and (3)

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement,

whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 301(a) of National Labor Relations Act, as amended, 29 U.S.C. 185(a)

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.